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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELWOOD NADER

Petitioner,

v.

CABEL B. MCBRIDE and

THOMAS J. ESCOVAR

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

Petitioner brought a suit for malicious prosecution and abuse of process against defendant McBride and his attorney, defendant Escovar, respondents herein, for knowingly and maliciously using Ohio's legal system to interfere with petitioner's fundamental property right to practice his profession. The questions thereby arising are:

1. Whether the Supreme Court of Ohio's orders (a) overruling a motion for an order directing the Court of Appeals and to certify to record and (b) dismissing the appeal sua sponte, and Ohio's requirement that there be a seizure of person or property for actions in prosecution and abuse of process to be sustained are consistent with the Due Process Clause of the Fourteenth Amendment and had; (A) deprived petitioner of remedies implied by his injured property right without due process, (B) deprived petitioner of his property interest in an accrued cause of action without due process, and (C) deprived petitioner of his Seventh Amendment right to a trial by jury to which he was entitled as part of his remedy, and which should be incorporated within the meaning of due process and made applicable to the states through the Fourteenth Amendment to the United States Constitution.

INDEX

	Page
Questions Presented	i
Opinons Below	1
Jurisdiction	2
Constitutional Provisions	2
Statement of Facts	2
Brief in Support	5
Conclusion	20
Appendix A- Orders of the Supreme Court of Ohio	A1-2
Appendix B - Opinion of the Court of Appeals of Ohio, Eighth District	B1-7

AUTHORITIES

Cases	Page
Abbott v. Thorne, 34 WASH. 692, 76 Pac. 302	14, 15
Ackerman v. Kaufman, 41 ARIZ. 110, 15 P. 2d 966	15
Antoni v. Greenshaw, 107 U. S. 767 . . .	9
Baltimore & C. Line v. Redman, 295 U. S. 654	17
Brand v. Hinchman, 68 MICH. 590, 36 N. W.	

664 . . . . . 8, 15

Brown v. Western Ry. of Alabama, 338 U. S. 294 . . . . . 9, 10

Carnation Lumber Co. v. McKenney, 224 ORE. 541, 356 P. 2d 932 . . . . . 13, 14

Clifton Hills Realty Co. v. City of Cincinnati, 135 O. S. 625, 21 N.E. 2d 993 7

Covington & c. Turnpike Co. v. Sandford, 164 U. S. 578 9

Dairy Queen v. Wood, 369 U. S. 469 . . . 17

Dimick v. Shiedt, 293 U. S. 474 17

Dent v. West Virginia, 129 U. S. 114 . . 6

Duncan v. Louisiana, 391 U. S. 145 . . . 18

Dunn v. Blumstein, 405 U. S. 330 12

Eastin v. Bank of Stockton, 66 CAL. 123, 4 Pac. 1106 . . . . . 15, 16

Ely v. Davis, 111 N. C. 24, 15 S. E. 878 13, 14

Gregory v. Colvin, 235 ARK. 1007, 363 S. W. 2d 539 7

Greene v. McElroy, 360 U. S. 474 6

Hagar v. Reclaimation District No. 108, 111 U. S. 701 10

Hardware Dealer's Mutual Fire Insurance Co. v. Glidden co., 284 U. S. 151 17

Inter State Vaccine Co. v. Redman, 28 O. Dec. 4, 20 O. N. P. 17 7

Jimenez v. Weinberger, 417 U. S. 628 . . . 12

Johnson v. Walker-Smith Co., 47 N. M. 310, 142 P. 2d 546 13

Kolka v. Jones, 6 N. D. 641, 71 N. W. 558. 14

Levy v. Adams, 140 FLA. 515, 192 So. 177 . 16

Lipscomb v. Shofner, 96 TENN. 112, 33 S. W. 818 15

Marbury v. Madison, 1 Cranch 137 8

Maryland Casualty Company v. Brown, 321 F. Supp. 309 7

Monogehela Bridge Co. v. United States, 216 U. S. 177 9

Mulholland v. Waiter's Union, 13 O. Dec. 342 7

Munn v. Illinois, 94 U. S. 113 10

Myhre v. Hessey, 242 WIS. 638, 9 N. E. 2d 106 14

Palko v. Connecticut, 302 U. S. 319 . . . 18

Peerson v. Ashcraft Cotton Mills, 201 ALA. 348, 78 So. 204 . . . . . 14, 15

Porter v. Wilson, 239 U. S. 170 9

Primes v. Tyler, 43 O. S. 2d 195, 331 N. E. 2d 723 . . . . . 11, 13

Pritchard v. Norton, 106 U. S. 132 7

Rivers v. Dixie Broadcasting Co., 88 GA. App. 131, 76 S. E. 2d 229 15

Rosane v. Singer, 112 COL. 363, 149 P. 2d 372 7

Scott v. Neely, 140 U. S. 106 17

Seligman v. M. P. Operator's Union, 88 O. App. 137, 98 N. E. 2d 54 7

Shute v. Shute, 180 N. C. 386, 104 S. E. 764 17

Stanley v. Illinois, 405 U. S. 645 . . . 11

Sturges v. Crowninshield, 4 Wheat 122 . . 10

Teesdale v. Liebschwager, 42 S. D. 323, 174 N. W. 620 16

Truaxe v. Corrigan, 257 U. S. 312 6

Vlandis v. Kline, 412 U. S. 441 . . . . . 10, 13

Von Hoffman v. City of Quincy, 4 Wall. 535 10

Walker v. Sauvinet, 92 U. S. 90 17

Werner v. Southern California Associated Newspapers, 35 CAL. 2d 121, 216 P. 2d 825 7

Wetmore v. Mellinger, 64 IA. 741, 18 N. W. 870 . . . . . 13, 15

Constitutional Provisions

United States Constitution

- Seveneth Amendment 2
- Due Process Clause (Fourteenth Amendment) 2

Statutes
English
- Statute of Marlbridge, 52 Hen. III. 14

Miscellaneous
Blackstone, Commentaries, Vol. 3, p. 23 8

Prosser, W. Handbook on the Law of Torts, 4th Ed. § 120 p. 851 15

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Petitioner

v.

CABEL B. MCBRIDE and
THOMAS J. ESCOVAR

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

The petitioner, ELWOOD NADER, prays that a writ of certiorari issue to review the final order affirming the dismissal of his claims as rendered by the Supreme Court of Ohio on November 7, 1980.

OPINIONS BELOW

The Supreme Court of Ohio's order dismissing petitioner's appeal sua sponte is set forth infra as Appendix A. The opinion of the Eighth District Court of Appeals of Ohio, not reported, is set forth infra as Appendix B. The dismissal order by the Court of Common Pleas for Cuyahoga County, Ohio was issued without accompanying

opinion.

JURISDICTION

The order of the Supreme Court of Ohio was entered on November 7, 1980, and is set forth infra as Appendix A. This petition for certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Seventh Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty or property, without due process of law. . ."

STATEMENT OF FACTS

Petitioner Elwood Nader, M.D. was named as the defendant in a civil action, case number 950606, which was filed in the Cuyahoga County Court of Common Pleas by Attorney Thomas J. Escovar on behalf of Cabel McBride. That action alleged that petitioner had provided negligent medical treatment to the injured leg of Cabel McBride.

Several months later, plaintiff McBride

elected to retain other counsel to represent him. On June 29, 1977, Plaintiff's new counsel petitioned the court to have the case dismissed. This petition was granted on June 26, 1977. Over eighteen months had passed since the initial filing date of the suit, December 22, 1975.

While the lawsuit was pending Elwood Nader, the petitioner herein, was not arrested, nor was his property physically seized. Yet his property was interfered with in that the practice of his profession was disrupted.

On October 3, 1977, petitioner filed a civil action against defendants McBride and Escovar. The complaint alleged that the defendants had knowingly and maliciously filed and prosecuted a baseless and unfounded civil action.

In the fifth paragraph of the complaint the petitioner stated his damages as follows:

> "Plaintiff herein, Elwood Nader, M.D. further states that as a result of said filing and prosecution of said prior civil action, he has suffered injury and damage to his person, to his professional reputation, to his medical practice and income, and further by the interference with his person and property in that the filing and prosecution of said prior civil action has caused plaintiff herein special injuries and damages due to the loss of time and income which were occasioned by the filing of said prior civil action. Plaintiff states that his person and property rights have therefore, been interfered with by defendants herein."

Pursuant to motions to dismiss filed by the defendants, the trial court dismissed petitioner's complaint for failure to state a claim upon which relief could be granted.

On appeal petitioner first argued that a

cause of action had been stated sufficiently. The appellate brief pointed out that "paragraph 5 of the First Cause of Action of the complaint alleges a constructive interference and seizure of the person and property of Elwood Nader."

Petitioner first raised the common law principle that for every injury there is a remedy in the discussion of his Fourth Assignment of Error. On page 23 of the appellate brief petitioner said:

> "The most serious consequence of the English rule, however, is that it leaves real injury without a remedy. Persons are barred from a cause of action by the rule not because they have no injury or because they claim some speculative kind of injury that the law will not recognize, but rather because of the artificial judicial distinction ill-suited to the purpose for which it was created. This sort of result is inconsistent with the established principles of common law."

Petitioner first raised his right to a trial by jury under the Seventh Amendment to the United States Constitution in the discussion of his Second Assignment of Error. On page eight of the appellate brief petition said that "even if present Ohio law were interpreted to preclude such claims for relief, such a preclusion still effectively denies appellant's right to trial by jury and access to the courts in accordance with the above constitutional provisions."

The Court of Appeals in the Eighth Judicial District of Ohio addressed itself to petitioner's First Second and Fourth Assignments of Error. It simply reasserted Ohio's standard:

"it is clear that since there has been no

> arrest of the person or seizures of the property of appellant, the instant action does not meet the requirements of a malicious prosecution action arising from a civil suit and the lower court properly granted this appellee Escovar's motion."

See Appendix B at 4. At no time did the Court of Appeals address itself to petitioner's constitutional arguments.

Petitioner's Memorandum in Support of Jurisdiction in the Supreme Court of Ohio reasserted the right to a remedy and the right to a trial by jury in Proposition Four. Petitioner's accrued right to bring a cause of action was also asserted in Proposition Four:

> "There can be no doubt that persons such as the appellant have received an injury and are denied a remedy by the Ohio Courts (sic) adoption of the minority rule in regards to malicious prosecution actions. They have an accrued right of action, without remedy. Such a denial is a deniel of due process of law."

On November 7, 1980, The Supreme Court of Ohio overruled petitioner's motion for an order directing the Court of Appeals and dismissed the appeal sua sponte. It gave as it's reason that "no substantial constitutional question exists herein." See Appendix A, p. 2.

BRIEF IN SUPPORT

1. The Due Process Clause of the Fourteenth Amendment requires an appropriate remedy for an injury to Fundamental Rights and deniel of access to the Courts where an injury has occurred effectively denies such a remedy and due process of Law.

In the case at bar, the petitioner's fundamental rights have been interfered with, and he incurred damages as a result. A remedy is implied for every injury to a fundamental legal right. Where the right to a remedy amounts to an accrued cause of action as in the instant case, such cause of action is itself a property right. Due Process requires access to the courts and a fair hearing on the merits of such a cause of action, since no justifiable basis exists for denying that remedy.

I. An Occupation is a Fundamental Property Right

Generally the right to engage in an occupation is discussed in the context of government interference; regulations imposed by a government upon occupational rights must comply with the due process requirements of the Fourteenth Amendment. Greene v. McElroy, 360 U.S. 474; Dent v. West Virginia, 129 U.S. 114; Truaxe v. Corrigan, 257 U.S. 312. In Greene, supra, this courts stated that "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." 360 U.S. at 442.

Although the Due Process Clause does not affect interactions between individuals, the underlying principle of the cases cited above applies to private citizens; a person's right to engage in a business or occupation must not be interfered with. This is true in Ohio, where the Court of Appeals has stated:

> "The right to labor, to follow a chosen trade or occupation, and to earn a livelihood for oneself and those dependent on him, is a property right within the benign

protection of the bill of rights of the Ohio Constitution, and of the Constitution of the United States, and the invasion of that right is a legal wrong for which the law provides a remedy."

Seligman v. M.P. Operator's Union, 88 O.App. 137, 145, 98 N.E. 2d 54, 59. See also Clifton Hills Realty Co. v. City of Cincinnati, 135 O.S. 625, 21 N.E. 2d 993; Mulholland v. Waiter's Union, 13 O.Dec. 342.

II. A Claim for Damages is Itself Property

A vested right of action is property in the same sense that tangible things are property. Pritchard v. Norton, 106 U.S. 132. "It is basic property law that a chose in action is personal property. The right to sue for damages is property." Gregory v. Colvin, 235 ARK. 1007, 363 S.W. 2d 539, 540. The rules of constitutional procedure apply to such property. Inter State Vaccine Co. v. Redman, 28 O Dec. 4, 20 O.N.P. 17. On the latter point the District Court of Appeals for California said:

"The right to recover actual damage is property and the constitutional guaranties of that right are the same as of other property right; hence an injured party cannot be deprived thereof without due process of law, which means that he is entitled to a hearing and determination by a court of law."

Werner v. Southern California Associated Newspapers, 35 CAL. 2d 121, 135, 216 P. 2d 825. See also Rosane v. Singer, 112 COL. 363, 149 P. 2d 372; Maryland Casualty Company v. Brown, 321 F. Supp. 309.

Since petitioner has the right to a remedy,

and that right was his property, denial of his right also deprived him of property. The Due Process Clause states: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . ." In the instant case the State of Ohio has done just that.

III. An Injury to a Fundemental Right Implies a Remedy

The maxim "ubi jus ibi remedium" clearly applies to American Jurisprudence. "(I)t is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit, or by action at law, whenever that right is invaded." Blackstone, Commentaries, Vol. 3, p. 23. Chief Justice Marshall endorsed the principle emphatically in ruling that William Marbury, having incurred an injury to a legal right was entitled to a remedy in Marbury v. Madison, 1 Cranch 137. He explained the ruling by stating: "The essence of civil liberty consists of the right of every individual to claim protection of the laws whenever he receives an injury." 1 Cranch at 162.

That the common law provides a remedy even where there has been no physical seizure of property has been long established:

> "The common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business is lessended or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed."

Brand v. Hinchman, 68 MICH. 590, 598, 36 N.W. 664, 668.

Although generally remedies must be sought from legislatures, courts rarely feel restrained by technical rules where acts violate fundamental principles such as property rights. Monogehela Bridge Co. v. United States, 216 U.S. 177; Antoni v. Greenshaw, 107 U.S. 767.

IV. A State Court's Denial of a Remedy For An Injured Property Right is Not Consistent With Due Process

States may generally regulate their own forums, yet the restrictions upon access to courts imposed in a State forum must not impair federally protected rights or curtail due process.

Where state courts enforce remedies based upon federal statutes, state procedural technicalities must not interfere with the federal remedy provided for. See Brown v. Western Ry. of Alabama, 338 U.S. 294; Covington & c. Turnpike Co. v. Sandford, 164 U.S. 578. In Brown, supra, Georgia courts sustained a demurrer based on Georgia's practice of construing a complaint most strongly against the pleader. On certiorari, this court reversed because the Georgia rule of practice had impaired substantive rights. See also Porter v. Wilson, 239 U.S. 170.

In the present case petitioner's property rights are not based upon a federal statute, but upon his fundemental rights as an American citizen. Just as when a State enforces a federal statute, a State's enforcement of fundamental rights and remedies, which are protected by the Constitution and which comprise "the essence of civil liberty," must also guarantee the substance of the rights involved. Speaking in the area of contractual rights this court stated: "It is competant for the States to change the form of a remedy or modify it otherwise, as they

see fit, provided no substantial right secured by the contract is thereby impaired." Von Hoffman v. City of Quincy, 4 Wall. 535, 553. See also Sturges v. Crowninshield, 4 Wheat 122.

So too must property rights, emanated by our Federal Constitution, not be subverted by state procedural deprivations. In Munn v. Illinois, 94 U.S. 113, this court stated that "rights of property which have been created by common law cannot be taken away without due process; but the law itself as a rule of conduct may be changed at the will, or even whim of the legislature unless prevented by constitutional limitations." 94 U.S. at 134. Private rights and property may not be taken from a claimant "without observance of those general rules established in our system of jurisprudence for the security of private rights." Hagar v. Reclaimation District No. 108., 111 U.S. 701, 708.

Substantive due process is a very grey area of the law as Justice Black stated, "To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best," Brown, supra at 296. Yet one state practice, the use of irrebutable presumptions in determining rights, has been identified as being inconsistent with due process.

In Vlandis v. Kline, 412 U.S. 441, this court struck down a Connecticut statute that imposed an irrebutable presumption that students originally from out-of-state would not become citizens of the state. This presumption was violative of the Due Process Clause because it provided students with no opportunity to demonstrate that they had become citizens of Connecticut. The Ohio Supreme Court, relying on Vlandis, struck down a guest statute as unconsti-

tutional because it created the irrebutable presumption that non-paying passengers were in collusion with their drivers. Such a presumption denied them of a remedy. Primes v. Tyler, 43 O. S. 2d 195, 331 N.E. 2d 723.

A remedy should not be denied on the basis of illusory conclusions and presumptions whose sole purpose are to prevent future occurrences which are no more than slight possibilities, and at best great improbabilities. The basis for the rule applied to such causes of action deal not with their substance or merit, which is undenied, but with the claimed effects such suits could have upon litigation. The Constitution and the Due Process Clause recognizes higher values than speed, efficiency, or as in this case, unfounded fears of deleterious effects on litigation. Stanley v. Illinois, 405 U.S. 645, 656.

The opportunity for a fair hearing of ones claims cannot be denied solely because of a claimed interest in preventing deleterious effects on litigation. The Ohio rule in such cases grants a special privilege and immunity to persons who abuse civil process and maliciously file lawsuits, by allowing no recourse where these persons do everything and anything short of causing a actual arrest, garnishment, attachment or other seizure of person or property. The artificial and arbitrary distinction thus created ignores the realities that interferences with property rights can be as damaging as an arrest or attachment.

The Ohio rule in essence creates a irrebutable presumption that there is no damage unless such seizures of person or property occur, and that any damage that might occur is not great enough to overcome the irrebutable presumptions that honest litigants will be deterred from using the courts, that interminable

litigation will result and that costs are recovered, so as to require a different rule.

The interest in judicial access and economy connot save these conclusive presumptions from invalidity under the Due Process Clause anymore thatn an interest in administrative ease could. It is forbidden by the Due Process Clause to deny an individual access to the courts to remedy a wrong, based upon such irrebutable presumptions and arbitrary standards when these presumptions and standards upon which the rule and its objectives are based are not necessarily or universally true, and where reasonable protections against the claimed evils are built in to the alternative rule, which would allow protection and relief to all parties. Standards of due process require that individuals be allowed the opportunity to present their claims by being afforded access to the courts.

Where there is another, reasonable way to achieve goals with a lesser burden on constitutionally protected activity, the way of greater interference cannot be sustained. Dunn v. Blumstein, 405 U.S. 330. No legitimate interests are protected by denyingaccess to the courts. The Ohio rule is not rational or rationally related to its goals. It is in effect arbitrary and self defeating as to those goals. An absolute bar to maliciously prosecuted persons is not necessary to prevent interminable lawsuits or protect honest litigants. The Ohio rule actually protects the dishonest litigant and denies the remedy to the honest but maliciously prosecuted defendant. This court has recognized that the arbitrary impositions of diabilities is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing. Jiminez v. Weinberger, 417 U.S. 628, 632. The remedy should not be withdrawn from all injured persons in order to avoid a rare occurrence of subsequent

successive lawsuits or a rare honest litigant who might be deterred.

Although the instant case involves a judicially adopted rule of pleading and not a statute, the same objectionable type of irrebutable presumption is created by it. In effect, the English "seizure of person or property" rule imposes an irrebutable presumption that persons unable to meet the pleading burden have not incurred injuries to property or that the law will remedy. Since such pleaders are given no opportunity to rebut such a presumption by demonstrating the harm done to their property, they are deprived of any remedy whatsoever. This deprivation is not justified in any way. The logic of Vlandis v. Kline, supra, and Primes v. Tyler compel the conclusion that this rule conclusively precludes a remedy and denies due process of law to injured persons even though the evils it assumes to exist may never come to fruition. Such a rule is violative of the Fourteenth Amendment in that it denies due process of law, and the benefit of the law to people, by granting a special privilege and immunity to persons who file malicious lawsuits and injure people by means other than seizure of their person or property.

V. The English Rule Has No Justifiable Basis

The English fule is based upon three rationale. The first is that a successful defendant in a civil suit receives costs, which are intended by the legislature as full compensation, and therefore, an exclusive remedy, for any injury suffered. Ely v. Davis, 111 N.C. 24, 15 S.E. 878; Carnation Lumber Co. v. McKenney, 224 ORE. 541, 356 P. 2d 932. Second, a more liberal rule would deter honest litigants from seek justice for fear of action in return if they fail. Johnson v. Walker-Smith Co., 47 N.W. 310, 142 P. 2d 546, 547; Wetmore v. Mellinger, 64 IA.

741, 18 N.W. 870. Finally, in the absence of the arrest or seizure requirements, a rash of litigation would insue and suits would be come interminable. Abbott v. Thorne, 34 WASH. 692, 76 P. 302, 303-04 (1904); Myhre v. Hessey, 242 WIS. 638, 9 N.W. 2d 106.

The American rule, on the other hand, is based on the rationale that those who have suffered actual injury caused by a malicious suit should be fully compensated for their loss and that the stringent requirements of malice and lack of probable cause are sufficient to deter abuse. Kolka v. Jones, 6 N.D. 461, 71 N. W. 558, 559-61; Peerson v. Ashcraft Cotton Mills, 201 ALA. 348, 78 So. 204, 205.

Statutory Costs As a Remedy

Courts following the English rule sometimes rely on English precedent that since the passage of the Statute of Marlbridge, 52 Hen. III in 1267, there has been no independent action for malicious prosecution of a civil suit at common law, except where the defendant in the original action was arrested or had his property seized incident to that action. Ely v. Davis, supra. The Statute of Marlbridge idd abolish the cause of action for malicious prosecution of a civil suit in England and replaced it with an award of certain "costs" to successful defendants who had been maliciously proceeded against. Kolka v. Jones, supra, at 560. Taking off on this logic, some courts in adopting the English rule have found a legislative intent in various state cost statutes to restrict independent actions for malicious prosecution of civil suits. Abbott v. Thorne, 34 WASH. 692, 76 P. 302; Carnation Lumber Co. v. McKenney, supra.

This application of English precedents and the logic supporting them in the American

context is improper, however. The Statute of Marlbridge made available to the successful defendant maliciously sued not only costs incurred but also damage suffered as a result of the suit. Eastin v. Bank of Stockton, 66 CAL. 123, 4 P. 1106, 1109; Lipscomb v. Shofner, 96 TENN. 112 33 S.W. 818. In a real sense, therefore, the remedy provided by the Statute is a complete one, removing the need for an independent action. Ackerman v. Kaufman, 41 ARIZ. 110, 15 P. 2d 966, 967. American cost statutes, however, are much narrower in scope, compensating the successful party for only a portion of the litigation expense, and providing no compensation for damages to the successful defendant maliciously proceeded against. Brand v. Hinchman, 68 MICH. 590, 37 N.W. 664, 667; Peerson v. Ashcraft Cotton Mills, 201 ALA. 348. 78 So. 204, 205 (1917); Ackerman v. Kaufman, supra. 15 P. 2d at 967; Prosser §120, at 851.

At least one court has attempted to reconcile the English rule with the American system. In Rivers v. Dixie Broadcasting Co., 88 GA. App. 131, constructive seizure of a business is recognized as a special injury within the meaning of the English rule.

Impact of Litigation

Courts in the English rule jurisdictions have vigorously maintained that a readily available action for malicious prosecution of civil suits will deter honest, potential plaintiffs from suing for fear of retaliatory litigation and will create a flood of interminable lawsuits. Wetmore v. Mellinger, supra, at P. 871; Abbott v. Thorne, supra, at P. 303.

The English rule, however, is over-restrictive. The law already protects the honest plaintiff by limiting his exposure from suit to

his personal expenses and meager statutory costs. Teesdale v. Liebschwager, 42 S. D. 323, 174 N.W. 620, 621. Furthermore, it minimizes the threat of a retaliatory malicious prosecution suit against him by requiring an opponent challenging his motives in bringing suit to prove both malice and lack of probable cause. Eastin v. Bank of Stockton, supra; Levy v. Adams, 140 FLA. 515, 192 So. 177, 179.

The blanket restriction of the English rule also generates consequences as undesirable as those it endeavors to prevent. It obliterates the distinction that would otherwise exist at law between malicious and honest suitors, extending to the malicious the limited liability for expenses and costs intended only for the honest, so long as the opponent is not arrested and his property not seized. The rule, therefore, by shielding the malicious litigant, encourages malicious suits, contrary to public policy.

The most serious consequence of the English rule, however, is that it leaves real injury without remedy. Persons are barred from a cause of action by the rule not because they have no injury or because they claim some speculative kind of injury that the law will not recognize, but rather because of an artificial judical distinction ill-suited to the purpose for which it was created. This sort of result is inconsistent with established principles of common law.

VI. Petitioner Is Entitled to a Trial By Jury as Part of His Remedy; The Right to a Trial By Jury Should be Incorporated Within the Meaning of Due Process and Made Applicable to the States Through The Due Process Clause of the Fourteenth Amendment.

The principle of the right to a trial by jury has been frequently enunciated by this court. In Dimick v. Shiedt, 293 U.S. 474, this court said: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." 293 U.S. at 486.

While the right to a trial by jury in criminal proceedings has been zealously guarded, the same right in civil proceedings has been neglected; it has never been incorporated within the meaning of the Due Process Clause. Walker v. Sauvinet, 92 U.S. 90; Hardware Dealer's Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151.

As a general rule, the right to a trial by jury is protected by the Constitution to the extent that it existed at common law at the time the Constitution was adopted. Baltimore & C. Line v. Redman, 295 U.S. 654, 657. A claim for money damages, having been an action at law, is triable by a jury as a matter of right. Scott v. Neely, 140 U.S. 106, 110; Dairy Queen v. Wood, 369 U.S. 469, 477. The mere malicious prosecution of a civil action without probable cause is considered to be a legal wrong that also gives rise to a common law right of action and for which the law will afford redress. Kolka v. Jones, supra; Shute v. Shute, 180 N. C. 386, 104, S.E. 764.

In the instant case the petitioner has made allegations of facts and injuries that require a trier of fact. The right to a remedy would be empty of any meaning if it did not entitle the injured party to a full fact-finding proceeding. The remedy is a Trial, and a trial by jury as guaranteed by the Seventh Amendment is a

basic right an essential element of due process.

The denial of a remedy would be a denial of due process, and proper, and only remedy is a trial as guaranteed by the Seventh Amendment. The only way to provide for that guarantee is to incorporate the Seventh Amendment within the Due Process Clause of the Fourteenth Amendment to make it applicable to the States. The arguments for this cannot be stated any better than they were by Mr. Justice Black in his concurring opinion in Duncan v. Louisiana, 391 U.S. 145, wherein he reiterated his position that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. While agreeing with the process of absorption, he stated that,

> " . . . immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." (citing Palko v. Connecticut, 302 U.S. 319, 324-325) Id., at 163.

Further, Justice Black pointed out that Palko concluded that the Amendments of the Bill of Rights that are implicit in the concept of ordered liberty are absorbed by the Fourteenth Amendment as protections against state invasion. Id., at 164. Surely, the right to a trial in civil cases must be considered as implicit in our concepts of ordered liberty. Access to the courts for fair and impartial hearings and to resolve grievances, civil as well as criminal, is one of the most important freedoms we have. As Justice Black stated,

" . . . The historical appendix to my

Adamson dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (The Bill of Rights) applicable to the States." Id., at 168

* * * * * * *

" . . . the words "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminantly reasonable way of expressing the idea that henceforth The Bill of Rights shall apply to the States." Id., at 166.

The Seventh Amendment should therefore be absorbed by the Fourteenth, and Petitioner provided a remedy for the injury he sustained.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the orders of the Supreme Court of Ohio.

Respectfully submitted,

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Counsel for Petitioner

February 3, 1981

APPENDIX

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1980 TERM
City of Columbus.)	To wit: November 7, 1980
Elwood Nader,	No. 80-1210
Appellant,	APPEAL FROM THE COURT OF APPEALS
vs.	
Cabel B. McBride et al.,	for Cuyahoga County
Appellees.	

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19____

_____ Clerk

_____ Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1980 TERM
City of Columbus,)	To wit: November 7, 1980
Elwood Nader,	No. 80-1210
Appellant,	MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
vs.	
Cabel B. McBride et al.,	for Cuyahoga County
Appellees.	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by

Richard K. Jacob

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this court.

Witness my hand and the seal of the Court this ____ day of _____ 19___

_____ Clerk

_____ Deputy

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 39641

ELWOOD NADER, M.D., APPEAL FROM

APPELLANT COMMON PLEAS COURT

vs. No. 975,394

CABEL B. MCBRIDE, ET AL,

JOURNAL ENTRY

AND

APPELLEES

OPINION

DATE JUN 19 1980

DONOFRIO, J.

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudical to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On December 22, 1975, the appellee, Attorney Thomas J. Escovar, on behalf of the appellee, Cabel P. McBride, filed a lawsuit, case number 950606, against the appellant, Elwood Nader, M.D. This civil action alleged that appellant had provided negligent medical treatment to appellee McBride, with respect to

injuries which appellee McBride had sustained to his right leg. While the lawsuit was pending, no seizure of appellant's person or property occurred.

Several months later, appellee McBride elected to retain other counsel to represent him, and appellee Escovar withdrew as counsel. Subsequently, on June 20, 1977, appellee McBride's new counsel petitioned the court to have the case dismissed. This petition was granted on June 26, 1977.

Following the dismissal of the aforementioned case, appellant filed a lawsuit against appellee McBride for malicious prosecution, negligence and legal malpractice, case number 975394. The trial court, pursuant to motions to dismiss filed by appellees, dismissed appellant's complaint.

Appellant sets forth four assignments of error:

"I. It was error for the trial court to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Ohio Rule of Civil Procedure 12(B), since plaintiff's complaint was sufficient in stating causes of action against its defendants.

"II. It was error for the court to dismiss plaintiff's complaint since the plaintiff's right to a trial by jury as preserved in the Seventh Amendment to the U. S. Constitution and by Article I Section 5 of the Constitution of the State of Ohio, violated

by said dismissal.

"III. It was error for the court to dismiss plaintiff's second cause of action for negligence and legal malpractice against defendant Escovar since said cause of action stated a claim upon which relief can be granted.

"IV. It was error for the court to dismiss plaintiff's first cause of action which properly stated a claim upon which relief could be granted, consistent with prior Ohio law."

All the above assignments of error are inter-related and will be discussed together. The issues under these assignments of error fall into two categories. These categories deal with the correctness of the dismissal of appellant's complaint by the trial court. The complaint dealt with (A) malicious prosecution and (B) legal negligence and malpractice.

An action for malicious prosecution has met with marked disfavor in the courts of Ohio. The courts have allowed recovery only when requirements of such actions have been fully complied with. An action will not lie unless there has been seizure of property or the arrest of a person. Skarbinski v. Henry H. Krause Co., 378 F. 2d 656, 14 Ohio Misc. 54 (1967). Thus, it is succinctly stated in 35 Ohio Jurisprudence 2d 120-121, Malicious Prosecution, Section 4:

"It is often said that action for malicious prosecution is not favored in law. Hence, as has been frequently pointed out, the action has been hedged about by limitations more

> stringent than those of almost any other act causing damage to another, and the courts have allowed recovery only when the requirements limiting it have been fully complied with."

The court was confronted with a malicious prosecution action based on the use of civil process. While some jurisdictions have held that the malicious prosecution of a civil action without probable cause is actionable, others have closely adhered to the English or "strict" rule that in order to maintain the action there must be an arrest of the person or a seizure of the property. Ohio has chosen to follow the "strict" rule. Cincinnati Tribune Company v. Bruck, 61 Ohio St. 489, 56 N.E. 198 (1900); Avco Delta Corp. of Ohio v. Walker, 22 Ohio App. 2d 61, 258 N.E. 2d 254, 51 Ohio Op. 2d 122 (1969); Perry v. Arsham, 101 Ohio App. 285, 136 N.E. 2d 141, 1 Ohio Op. 2d 266 (1956); Board of Education, etc. v. Marting, 7 Ohio Misc. 64, 217 N.E. 2d 712, 36 Ohio Op. 2d 134 (Madison Cty., 1956).

The policy reasons for the "strict" rule rest upon sound reasoning. These reasons may be summarized as follows:

> "(1) 'Costs' are given as adequate redress; (2) courts should be free and open to all without fear of being sued in return; (3) freely permitting malicious prosecution actions would make litigation interminable; (4) defendant should have no right to a malicious prosecution action, since plaintiff has no action if a defense is malicious and groundless." Perry v. Arsham, 101 Ohio App. 285, 136 N.E. 2d 141 (Cuyahoga County, 1956).

It is stated in Board of Education, etc.,

v. Marting, et al, 7 Ohio Misc. 64, 217 N.E. 2d 712 (1966) at 718:

> "The theory of plaintiff's case is that it suffered property damage exclusively. The rule in such case is stated in paragraph one of the syllabus of Cincinnati Tribune Co. v. Bruck (1900), 61 Ohio St. 489, 56 N.E. 198:
>
> > 'As a general rule no suit will lie for the malicious prosecution of a civil action, when there has been no arrest of the person or seizure of property.'
>
> "It has never been modified or reversed and was cited with approval in Peckham v. Union Finance Co. (1931), 48 F. 2d 1016, 1018, citing many other jurisdictions. See, also, Delk v. Colonial Finance Co. (1963), 118 Ohio App. 451, 194 N.E. 2d 885; Perry v. Arsham (1956), 101 Ohio App. 285, 136 N.E. 2d 141; Turner v. C. O. Advertising (1944), 75 Ohio App. 105, 61 N. E. 2d 217; 150 ALR 901."

It is clear that since there has been no arrest of the person or seizure of the property of appellant, the instant action does not meet the requirements of a malicious prosecution action arising from a civil suit and the lower court properly granted this appellee Escovar's motion.

Appellee Escovar refers the court to a recent decision of the Court of Appeals of Franklin County in the case of W.D.G., Inc. v. Mutual Manufacturing & Supply Co., et al, 5 Ohio Op. 3d 397 (1976), where the court set forth the following rule as respects actions for malicious

prosecution against attorneys:

> "The better rule, we believe, is that an attorney who acts with the authority of his client is not liable to a third party in an action for malicious prosecution. Some immunity from being sued by third persons must be afforded an attorney so that he may properly represent his client. To allow indiscriminate third-party actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to afford proper representation to his client in fear of some third-party action against the attorney himself."
>
> " * * * * "
>
> "As a general rule, an attorney is immune from liability to third persons arising from the performance of the attorney's professional activities as an attorney on behalf of; and with the knowledge of his client, unless such third person is in privity with the client." W.D.G., Inc. v. Mutual Manufacturing Co., et al, 5 Ohio Op. 3d at 399-400.

Based upon the foregoing, it is clear that the claim of appellant is without merit since the essential elements of a malicious prosecution action are absent. Accordingly, the lower court ruled properly in granting appellee Escovar's motion.

For the foregoing reasons the assignment of error on this issue is hereby overruled.

As to the second issue of legal negligence and malpractice, there can be no cause of action for negligence or malpractice against appellee Escovar, since there is no absence of privity between appellee Escovar and the appellant. W.D.G., Inc. v. Mutual Manufacturing & Supply Co. et al, 5 Ohio Op. 3d 397 (1976). There can be no negligence or malpractice absent a breach of some duty owed to the appellant. And, it is clear that there is no duty owed to a third person by the attorney in such a case, the attorney's only duty being to his client. In the recent case of Burkons v. Rogoff, et al, Cuyahoga County Common Pleas Case No. 953,503, there was a cause of action for negligence set forth in the appellant's complaint. In granting the appellant's motion and dismissing the action, the court stated that it could find no authority to support the appellant's theory, and further stated:

> "Finally, plaintiff argues that an action for 'negligence' has been stated which does not require any showing that there was restraint of the plaintiff's person or attachment of his property. In effect, plaintiff argues that an action for negligent abuse of civil process should be available when an action for malicious abuse of civil process is not available. Such a contention falls of its own weight. Certainly, if the courts will not allow an action for malicious conduct, there is no reasonable justification to allow an action for the same conduct with a characterization of 'negligence' instead of 'malice.'"

Similarly, in the recent case of O'Toole v. Franklin, 569 P. 2d 561 (Ore., 1977), where the plaintiffs alleged that the defendant attorneys

were negligent in not ascertaining the facts of their erroneous malpractice action and in maintaining and counseling the action when they knew such to be unjust, the court concluded:

> "* * * when it takes a 'special injury' to recover for the malicious pursuit of an unfounded civil action, it would be incongruous to base a recovery on mere carelessness without the same requirement. That is equally true of this count against the client, * * *
>
> "* * * we reject a theory of liability for negligence toward perhaps wrongfully sued that would reach injuries not protected against malicious prosecution of civil proceedings. Accordingly. The demurrer was properly sustained." O'Toole v. Franklin, 569 P. 2d 566, 567.

See, also, Lyddon v. Shaw, 372 N.E. 2d 685 (III. App., 1978) and Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa, 1978).

For the foregoing reasons we overrule appellant's assignment of error dealing with this issue.

Appellant's second assignment of error touches on the fact that the court erred in the dismissal of appellant's complaint since the appellant's right to a trial by jury as preserved in the Seventh Amendment to the U. S. Constitution and by Article I Section 5 of the Constitution of the State of Ohio violated by said dismissal.

We find this assignment of error has no merit. Right to trial by jury is given,

obviously, in factual matters that create causes of action. Under state of Ohio law, hereinbefore discussed, trial judge did not err in his judgment of dismissal.

For the foregoing reasons we affirm the judgment of the trial court.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedures, Exceptions.

O'NEILL, P.J., concurs.
COOK, J., concurs.

Cook, J., of the Eleventh Appellate District; O'Neill, P.J., and Donofrio, J., of the Seventh Appellate District, Sitting by Assignment.

JUDGE

JOSEPH DONOFRIO

For Plaintiff-Appellant:
Richard K. Jacob

For Defendant-Appellees:
George W. Stuhldreher,
Paul C. Clark and
Robert R. Disbro

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

No. 80-1314

MAR 23 1981
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1980

ELWOOD NADER,
Petitioner,

vs.

CABEL B. McBRIDE,

and

THOMAS J. ESCOVAR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, THOMAS J. ESCOVAR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities I

Statement of Facts 1

Reasons for Denying the Writ 3

The Pleadings and the Evidence Before the Trial Court Showed There Was No Genuine Issue As to Any Material Fact and That This Respondent Was Entitled to Judgment As a Matter of Law 3

Summary Judgment Procedure Under Civil Rule 56 Does Not Infringe Upon a Litigant's Right to a Jury Trial 5

TABLE OF AUTHORITIES

Cases

Cincinnati Tribune Company v. Bruck, 61 Ohio St. 489, 56 N.E. 198 (1900) 4

Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821 (1978) 4

Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902) 5

Harless v. Warehousing Co., 54 Ohio St. 2d 64 (1978) 3

O'Toole v. Franklin, 279 Ore. 513, 569 P.2d 561 (1977) 4

Textbooks and Civil Rules

Textbooks:

6 MOORE'S FEDERAL PRACTICE, ¶ 56.06[2] 6

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil Section 2714 6

32A O. JUR. 2d *Judgments* Section 886 6

Civil Rules:

Ohio Rules of Civil Procedure:

Rule 12(B)(6) 1
Rule 56 1
Rule 56(E) 3

Federal Rules of Civil Procedure:

Rule 56(e) 3
Rule 56 5

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BRIEF OF RESPONDENT, THOMAS J. ESCOVAR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Petitioner Elwood Nader filed a Complaint in the Court of Common Pleas of Cuyahoga County, Ohio alleging that the Respondent, Thomas J. Escovar, had maliciously and negligently filed a medical malpractice action against him. Respondent filed a Motion to Dismiss the Complaint, or, in the Alternative, Motion for Summary Judgment pursuant to Rule 12(B)(6) and Rule 56 of the Ohio Rules of Civil Procedure. In support thereof, Respondent annexed an Affidavit to the Motions which established that the Respondent was an attorney at law, licensed to practice in the State of Ohio; that he was retained by Cabel Mc-

Bride in December, 1975 to represent him in connection with a malpractice action against Dr. Elwood Nader; that the one-year statute of limitations for bringing such action was about to expire; that he concluded there existed a possible malpractice action against Dr. Nader; that in filing the action against Dr. Nader, he did not act maliciously, but with probable cause to believe an action existed against him; and that he did not at any time cause seizure of either the person or property of Dr. Nader. The Affidavit further established that two months after the Respondent filed the action against Dr. Nader, the representation of Cabel McBride was assumed by other counsel and that the Respondent withdrew as counsel for Mr. McBride. The Affidavit further established that the action against Dr. Nader was dismissed by successor counsel on June 20, 1977, over 16 months after the Respondent withdrew as counsel for Mr. McBride, and was dismissed without the knowledge of the Respondent.

Petitioner did not file any Affidavit nor offer any evidence in contradiction to Respondent's Affidavit or evidence.

Based upon the evidence and the legal authorities cited in the briefs of the parties, the trial court was compelled to grant summary judgment to the Respondent. This decision was affirmed by the Ohio Court of Appeals (Eighth Appellate District). The Ohio Supreme Court dismissed Petitioner's appeal, finding that the case presented "no substantial constitutional question."

Petitioner has now requested this Court to grant a Writ of Certiorari on the ground that his constitutional rights have somehow been violated. It appears that the Petitioner claims that he has been deprived of a property right without due process of law, and that he was deprived of a right to trial by a jury.

REASONS FOR DENYING THE WRIT

THE PLEADINGS AND THE EVIDENCE BEFORE TRIAL COURT SHOWED THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THIS RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

I. The Petitioner filed a Brief in Opposition to this Respondent's Motion for Summary Judgment, but presented no specific facts by Affidavit or otherwise to show there was a genuine issue for trial. Ohio Rule of Civil Procedure 56(E), which is identical to Federal Rule of Civil Procedure 56(e), provides, that when a motion for summary judgment is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations of his pleadings, but his response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. This provision of Rule 56(E) was particularly applicable in this case, and accordingly, the trial court granted summary judgment against the Petitioner. This provision of Rule 56(E) has been adverted to by the courts on numerous occasions in ruling upon motions for summary judgment. Hence, in the recent Ohio case of *Harless v. Warehousing Co.*, 54 Ohio St. 2d 64 (1978), the Supreme Court of Ohio stated at page 65:

> "Given the requirement of Civ. R. 56(E) that a party set forth specific facts showing that there is a genuine issue for trial, that party must so perform if he is to avoid summary judgment. *State, ex rel. Garfield Hts. v. Nadratowski* (1976), 46 Ohio St. 2d 441, 442-43, 349

> N.E. 2d 298. Unsupported allegations in the pleadings do not suffice to necessitate the denial of a summary judgment. The principal function of Civ. R. 56(E) is to enable movement beyond allegations in the pleadings, and to analyze the evidence so as to ascertain whether an actual need for a trial exists."

The courts have repeatedly stated that the purpose of Rule 56 is to allow the trial court to dispose of the case in advance of the hearing on the merits. The objective is to separate the sham and insubstantial from the real and genuine issues of fact.

II. Petitioner's Complaint alleged that this Respondent had maliciously and negligently filed a medical malpractice action against him. Cases of this nature have been brought with increasing frequency in recent years, and have become commonly known as "physicians' countersuits." The cases have been brought throughout the United States on various theories or grounds, and have met with a singular lack of success. *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821 (1978); *O'Toole v. Franklin*, 279 Ore. 513, 569 P.2d 561 (1977), and cases cited therein. (Also see cases cited in the Opinion of the Ohio Court of Appeals [Eighth Appellate District] that is set forth in the Appendix of the Petition for a Writ of Certiorari filed in this case.) It was clear from the Affidavit of this Respondent attached to the Motion filed in the trial court that he did not act with malice, nor did he act without probable cause. Moreover, the case was dismissed by successor counsel, not by this Respondent. Inasmuch as the elements of malice and lack of probable cause were missing, the case could have been dismissed upon those grounds alone. There is an additional ground, however, upon which the lower court was constrained to dismiss the case. In a long line of cases, beginning with *Cincinnati Tribune Company v. Bruck*, 61 Ohio St. 489, 56 N.E. 198 (1900),

Ohio has chosen to follow the English or special injury rule that in order to maintain an action for malicious prosecution, there must be an arrest of the person or a seizure of his property. In this case, the only evidence before the court established that there was no seizure or arrest of the person or property of the Petitioner arising out of the original civil action filed against him. Thus, his action was not cognizable under the laws of Ohio, and the trial court properly granted this Respondent's Motion.

The purpose of the English or special injury rule is to strike a balance between allowing free access to the courts for the vindication of rights and the undue exercise of such a right. Petitioner's argument, if accepted, would upset that delicate balance. Free access to the courts to settle disputes is a fundamental component of a judicial system. As a result, access should not be inhibited by fear of retaliatory lawsuits. To permit such retaliatory lawsuits would increase rather than decrease the amount of litigation. Where would the retaliation stop or does it continue *ad infinitum*? If so, litigation would truly become interminable and the strain on the judicial system would be devastating.

SUMMARY JUDGMENT PROCEDURE UNDER CIVIL RULE 56 DOES NOT INFRINGE UPON A LITIGANT'S RIGHT TO A JURY TRIAL.

Prior to the adoption of the Federal Rules of Procedure, this Court held that summary judgment procedure did not infringe upon the constitutional right of a party to a trial by jury. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902). Since the adoption of Federal Rule 56, whenever the issue of constitutionality has been raised, the courts have unanimously held that Rule 56 does not deprive a party of a jury trial. Once

the court determines that there are no disputed material facts for a jury to try, it may enter a judgment, and by so doing does not infringe upon the litigant's right to a jury trial. See 6 MOORE'S FEDERAL PRACTICE, ¶ 56.06[2]; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil Section 2714; 32A O. JUR. 2d *Judgments* Section 886 and cases cited therein.

In view of all of the above, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

GEORGE W. STUHLDREHER
GALLAGHER, SHARP, FULTON, NORMAN
& MOLLISON
Attorney for Respondent, Thomas J. Escovar